Central Law Journal.

ST. LOUIS, MO., JULY 31, 1908.

PROPERTY RETAINED BY ATTORNEYS ON GROUND OF ILLEGAL OR IMMORAL DESIGN ON PART OF PARTIES WHO TRUSTED THEM.

When property of a client through advice of his attorney is made over to such attorney to avoid creditors, or is retained by attorney because of moral turpitude of client in which the attorney participated in so turning over such property and cases of this sort, there arise some interesting questions.

That an officer of the court would be guilty of holding fast to property he had become possessed of, upon the alleged ground that he was guilty of fraud together with his client, is a strange and incongruous situation. That there is a total lack of moral sense in such a mind does not require second thought. That such a mind has no business to be engaged in the practice of the law needs no comment.

Perhaps the most brazen defense to an action by an attorney which has ever come to our notice, was that of J. A. Smith, an attorney practicing at Kansas City, Kansas, in the case of Smith v. Blank, 69 Kans. 853, 76 Pac. Rep. 858. The facts relied upon by him were that, during the pendency of an action in the district court of Lyon county, involving the forgery of a deed, claimed to have occurred in his office while he was practicing law in Emporia, J. W. Blank, one of the parties to that action, and the plaintiff in said suit, called upon him to induce him to either give false evidence upon the trial in favor of J. W. Blank, or absent himself so that his deposition could not be taken, or service of subpoena could not be made; that he agreed, in consideration of $200 to either absent himself, or, if he testified, to testify falsely. In pursuance of this agreement, J. W. Blank paid him $10 in cash and gave him the diamond in question to secure the remainder. Smith's contention was that the plaintiff ought not to recover because he parted with the diamond for an illegal or immoral purpose. The comment on the part of the court was terse and pointed and as follows: "The iniquitous engagement into which Smith entered, according to his own statement, furnishes sufficient cause not only to disbar him from the practice of the law, but probably subject him to fine and imprisonment. We have not read the briefs nor examined the record. The statement of plaintiff in error convinces us that he is not entitled to anything at the hands of this court but the severest censure and a dismissal of his proceeding." Yet in the face of this, Smith set up a defense to the disbarment proceeding and appealed from the judgment of the court disbarring him to the court which rendered the above opinion, and again that court scathed him as he deserved in upholding his disbarment.

There is every reason why a defense of this character should be similarly treated in every court where it is set up. Nor can we see how any member of the bar would be willing to lend his aid to such a defense; in doing so, he is *particeps criminis*, and ought to be subjected to a similar judgment. But the strangest part of all this is, that there is "many a man" who would condemn, in the roundest terms, such conduct as that of which Smith was guilty, and at the same time go to church on Sunday, engage in the communion service and then deliberately set about bilking his fellow-man, with a clear conscience of his own on the next day.

In the case of Place v. Hayward, 117 N. Y. 487, plaintiff and defendant's wife were children of the testatrix and interested in the estate. Plaintiff's evidence was to the effect that among the assets which came to his hands as executor, was a bond and mortgage and two endowment policies of insurance issued to testatrix on the life of her husband; that the plaintiff on the advice of the defendant, who was his attorney, and upon whose counsel and advice he impliedly relied in the management of the estate, they both fearing that the securi-

ties might be seized by adverse claimants, creditors of the testator's husband, assigned them to the defendant for the purpose of protecting them against such claimants and without any consideration for such assignments, with the understanding that the proceeds should belong to such estate; the defendant collected the insurance policies and received a portion of the proceeds of the collection of the bond and mortgage. The defendant set up the illegal purpose for which the transfer was made and claimed it as a defense to his keeping the money thus obtained; that the courts would not aid in a recovery because of this fraud. The court very properly held that an attorney by whose advice such a situation was brought about was not *in pari delicto* with the party whom he was influencing and that for this reason the rule he sought to invoke, to protect him in his fraudulent conduct, did not apply. They were not *particeps criminis*. In the face of such situations and their liability to arise, it is of the greatest importance that the courts should punish such conduct in the severest manner.

Another case which may be used to show our view, is that of Ford v. Harrington, 16 N. Y. 285, where an attorney on application of his client to know whether his equitable interest in certain land could be reached by his creditor, procured from his client an assignment of such interest for an inadequate consideration, promising to reconvey when he had settled with the creditor. Afterwards the attorney claimed to hold absolutely against his client.

It was held that although the object of the assignment was to perpetrate a fraud upon the creditor, yet on account of the relations existing between attorney and client, the attorney must be compelled to restore what he had acquired on being repaid what he had disbursed. We believe the court could have properly gone further and said that, because of the fraudulent conduct of the attorney in that case, he should return the property without reimbursement of the amount paid by the attorney for the equity, for there was a willful attempt to defraud, amounting to malice, which would justify the exercise of the punitive force of the law.

NOTES OF IMPORTANT DECISIONS

SALES—FAILURE TO PERFORM EXECUTORY AGREEMENT WHICH IS PART OF CONSIDERATION.—In the recent case of Bland v. Wandel (Iowa), 114 N. W. Rep. 899, it is held that mere failure to perform an executory agreement which is part of the consideration of or the inducement to a sale is not in itself proof of fraud existing at the time of the sale.

Defendant wrote plaintiff that he had ordered a car-load of flour elsewhere, which was unsatisfactory, and would cancel the order if plaintiff would accept the order for a car-load on terms mentioned in defendant's letter. The order was accepted. Afterwards, plaintiff learned that prior to the giving of this order, defendant had placed a mortgage on his property in favor of intervenor. Defendant did not cancel the previous order for a car-load of flour as he had stated he would, and, having become involved, plaintiff brought replevin to recover the flour sold, setting up defendant's failure to rescind the prior order as a fraud. The court says:

"It is elementary that the mere failure to perform an executory agreement which is part of the consideration or inducement to the making of a contract of sale will not per se constitute such fraud as to authorize the subsequent rescission of the contract by the other party." Citing Van Vechten v. Smith, 59 Iowa, 173, 13 N. W. Rep. 94; State Bank of Indiana v. Mentzer, 125 Iowa, 101, 100 N. W. Rep. 69; State Bank of Indiana v. Gates, 114 Iowa, 323, 86 N. W. Rep. 311; Chicago, T. & M. C. R. Co. v. Titterington, 84 Tex. 218, 19 S. W. Rep. 472, 31 Am. St. Rep. 39. The court goes on to say that: "If it can be shown that when the inducing promise was made and a sale consummated in reliance thereon the buyer had a secret intention not to perform the obligation which he undertook to perform in the future, then this secret intention not to perform, in itself, constitutes such fraud as to warrant a rescision if the promise was relied on by the seller, and was a material inducement to the making of the sale. Cox Shoe Co. v. Adams, 105 Iowa, 402, 75 N. W. Rep. 316; Swift v. Rounds, 19 R. I. 527, 35 Atl. Rep. 45, 33 L. R. A. 561, 61 Am. St. Rep. 781; Donaldson v. Farwell, 93 U. S. 631 23 L. Ed. 993. But the fraud relied upon must have existed at the time of the sale; it can-

not consist in a subsequent failure to perform an executory agreement. Kearney Mill. & E. Co. v. Union Pac. R. Co., 97 Iowa, 719, 66 N. W. Rep. 1059, 59 Am. St. Rep. 434. The mere failure to perform an executory agreement which is a part of the consideration of or inducement to the sale is not in itself proof of fraud existing at the time of the sale. Theusen v. Bryan, 113 Iowa, 496, 503, 85 N. W. Rep. 802; Starr v. Stevenson, 91 Iowa, 684, 60 N. W. Rep. 217."

CORPORATIONS—PAYMENT FOR CAPITAL STOCK IN OVERVALUED PROPERTY.—The subject of payment of capital stock of a corporation in overvalued property, and the consequent liability of the stockholder to the creditors of the corporation is discussed at length in Johnson v. Tennessee Oil, etc., Co. (N. J.), 69 Atl. Rep. 788. The suit was a creditors' bill brought by complainant on behalf of himself and all other creditors. Prior to bringing the suit a judgment had been recovered in the state of New Jersey, and execution having been issued was returned unsatisfied. The theory under which the suit was brought was that the capital stock was paid up in property grossly overvalued, and that the stockholders were therefore liable to the creditors of the corporation for the difference between the value of the property turned over to the corporation and the par value of the stock, or such proportion thereof as might be necessary to satisfy the claims of the creditors. The "trust fund" theory, as it is called, is examined by the court at great length, and the authorities reviewed. The "trust fund" theory of capital stock has in recent years become a fixed principle in the law of corporations. Under this theory, the capital stock of a corporation is a trust fund for the benefit of the creditors first, and then the stockholders. As is said in the principal case: "For a fraudulent use of the statutory and charter provisions by the issue of stock for property at a fraudulent overvaluation the holders of stock so issued would, however, remain subject to liability to creditors, under the equitable principles generally referred to as the 'trust fund' theory of capital stock. The capitalization in this case was so grossly excessive as to be fraudulent, and the complainant would be entitled to relief on this ground of fraud but for the fact that he was a subsequent creditor, with full notice of the fraudulent overvaluation."

The rule is founded upon the supposed reliance of the creditor upon the assets of the company as represented by its capital stock, it being held that a creditor dealing with a concern having a paid up capital stock of say, one hundred thousand dollars, has a right to assume that the corporation has received one hundred thousand dollars in payment of such capitalization, either in money, or in money's worth. If, then, it develops that the directors and stockholders have bartered away the capital stock for some comparatively worthless consideration, as some patent of unknown value, or oil leases, as in the principal case, or for tangible property which is not reasonably worth anything like the amount of capital stock issued in payment, the stockholders are liable at the suit of the defrauded creditor for the difference between what they have actually paid, and the par value of the stock received.

The question has frequently been raised as to the circumstances under which the stockholder may become liable, for example, whether he is liable if he has acted in good faith, and really believed that the property was of the value of the stock received. There is a strong tendency to hold the stockholder liable even where he has acted in good faith. In other words, the actual value of the property is the test, and good faith is no defense. Simons v. Vulcan Oil Co., 61 Pa. St. 202. On this point the Supreme Court of Missouri, in the case of Berry v. Rood, 168 Mo. 331, said: "When men are carried away by a mining prospect, they have a right to take such chances in speculation as they see fit in order to develop the prospect, provided they involve only themselves. But when they endeavor to hide their individual liability in a corporation and launch upon the business community a company which they proclaim as solemnly as men can proclaim anything, has a full paid capital of $300,000, and invite confidence accordingly, when they well knew that, so far as then developed, it has not 5 per cent of the amount available for use in the treasury, they violate both the letter and the spirit of our laws on this subject and render themselves liable to creditors who have been misled, to the extent of their unpaid capital stock." And, again, the same court, in Meyer's Case, 192 Mo. 189, said: "The property must be fully equal to the value placed upon it, and its value is determined by the fact and not by the opinions of the persons turning it over, even though they may have honestly believed it to be worth the amount certified."

In the principal case, the American trust doctrine is adhered to, but another principle defeated the complainant. He had knowledge of all the facts at the time he became a creditor. In fact, he was the attorney for the company, who engineered the deal, and the court holds, in line with the best authority, that as he had knowledge of the facts, he must stand in the position of any other creditor with notice. Equity does not grant this form of relief in these cases to those who know the

actual facts, or who are put on inquiry, and nevertheless extend credit. The case is one that will repay a careful reading.

CARRIERS—COMMENCEMENT OF RELATION OF PASSENGER AND CARRIER—DEGREE OF CARE.—It is held in Pere Marquette R. Co. v. Strange (Ind.) 84 N. E. Rep. 819, that the relation of passenger and carrier commences when a person with the good-faith intention of taking passage, with the consent of the carrier, express or implied, assumes the situation to avail himself of the facilities for transportation which the carrier offers. The plaintiff having entered the railroad company's premises for the purpose of taking a train in due course, and purchased a ticket entitling him to transportation between designated points, was, while approaching the train upon which he was to be carried, a passenger. This position is supported by numerous authorities cited by the court, among which are the following: 6 Cyc. 536; Citizens Street R. Co., v. Jolly, 161 Ind. 80; Freemont, etc. R. Co. v. Hagblad, 72 Neb. 773; Exton v. Central R. Co., 63 N. J. 356.

The proposition is laid down in this case that the degree of care required of a common carrier when a passenger is actually being transported is of the highest. It is held that the carrier is bound only for the exercise of ordinary care as to passengers who are not being actually transported but who are about the premises, station, platform, etc. The rule is stated as follows:

Appellant does not deny that the relation of passenger had been established before and existed at the time of the accident in which appellee was injured, but a sharp conflict is waged as to the measure of appellant's duty to him as such passenger while approaching one of its trains. The common law, for the purpose of determining questions of liability for injury, divided passengers into two classes—(1) those being transported, and (2) those not being transported. The highest practical care and diligence were exacted of the carrier for the safety of passengers of the first class, and in case of injury resulting from defective roadbed, equipment, or management a presumption of the carrier's negligence was indulged by law in favor of the injured person. The carrier was bound only for the exercise of ordinary care with respect to passengers of the second class, and in case of accidental injury no presumption as to negligence existed in favor of either party. The common-law rule has not been rescinded or modified by statute in this state. The propriety and justice of the requirement that a high degree of care be exercised for the security of passengers of the first class, and the sound public policy upon which the presumption of negligence in case of accidental injury to one of that class from defective roadway or equipment is founded, are manifest. A passenger being transported at a high rate of speed by powerful engines is helplessly in charge of the carrier, required to obey its regulations, and to rely for his safety wholly upon the foresight, care, and prudence of its agents. All of its ways, instrumentalities, and methods of operation are exclusively within its control, and the slightest omission or neglect with respect to any of these things is likely to be followed by frightful consequences. This court, appreciating the grounds upon which the rule was founded, has consistently held that when an injury is sustained by a passenger in transportation upon a railroad on account of the defective condition of roadbed, equipment, or management, the happening of the accident constitutes prima facie evidence of negligence on the part of the operating company, and devolves upon it the duty of establishing such facts as will exempt it from the imputation of negligence. Cleveland, etc., Ry. Co. v. Hadley (Ind.) 82 N. E. Rep. 1025; Pittsburg, etc., Ry. Co. v. Higgs, 165 Ind. 694, 76 N. E. Rep. 299, 4 L. R. A. (N. S.) 1081; Terre Haute, etc., R. Co. v. Sheeks, 155 Ind. 74, 56 N. E. Rep. 434; Cleveland, etc., R. Co. v. Newell, 104 Ind. 264, 3 N. E. Rep. 836, 54 Am. Rep. 312.

It is further argued that the special circumstances and risks attending the actual transportation of passengers do not exist with respect to passengers before entering or after leaving the coaches of such carriers. The perils which surround the passenger while around the platform, station, etc., are not different in kind from the peril encountered elsewhere. In other words, the passenger is able, to a considrable degree to look out for himself, but when on the train the passenger is peculiarly helpless, and absolutely dependent upon the carrier for his safety.

AGENCY—BURDEN OF PROOF—EVIDENCE.—In Rumble v. Cummings (Ore.), 95 Pac. Rep. 1112, it is held that where a party relies upon a contract, made with a person claiming to be an agent of another party, he must prove where the agency is disputed, that the person claimed to be an agent was expressly empowered by the person for whom he acted to make the agreement for him, and that the terms of the contract made were within the scope of the authority conferred, or that the principal knowingly permitted the agent to assume that he had power to make such contracts, or held the agent out to the public as possessing such power, or that the

principal, with full knowledge of the agent's arrogation of power in making the contract, ratified the agreement, citing Hahn v. Guardian Assurance Co., 23 Ore. 576, 32 Pac. Rep. 683, 37 Am. St. Rep. 709; Jameson v. Caldwell, 25 Ore. 199, 35 Pac. Rep. 245; Connell v. McLaughlin, 28 Ore. 230, 42 Pac. Rep. 218.

One dealing with an agent must satisfy himself of the agent's authority except as above, and where agency is alleged it must be established by the party relying upon the agency.

THE ADVISABILITY OF A LONGER LAW SCHOOL COURSE AND OF A HIGHER STANDARD OF ADMISSION.

The writer has noted with some interest the recent article in the January issue of the Law Notes anent the two year course in Southern law schools.

The position seems to be taken in this paper that a two year course in law is self sufficient where the standard of admission is high enough.

In North Dakota at the State University a two year law course for the day students is maintained, and, although it can be truthfully said that as conscientious and industrious a body of students as could be desired by a lecturer there attend, nevertheless, it is quite apparent that the two year course is too short not only for the student, who is not a college graduate, but as well for the student who has received his Baccalaureate degree, for we have both classes of students in our law course.

We take it to be conceded, at least among our brethren, that there is no profession or calling which requires a broader or deeper fundamental knowledge than the profession of the lawyer. The various and diverse phases of life with which it deals necessarily requires this for the successful practitioner, so that to-day there is a universal demand and a general trend among the law schools of our country requiring a broader fundamental knowledge and a higher mental training on the part of the student who desires to pursue a law course.

We realize that this whole matter must be considered from a practical, rather than a theoretical viewpoint with due regard to the actual results desired to be attained.

Thus, numerous instances can be cited where the student with some of the practical training of life, and without a collegiate training has far outstripped his brother student who is a college graduate, not only in grasping and comprehending the law, but also in the presentation of a more logical and receptive mind, and the same comparison can be drawn by individual citations of the lawyer without collegiate or law school training easily surpassing his opponent at the bar who has been equipped with both.

However, to-day the thought is generally accepted that a collegiate training offers the better and the quicker, the more scientific and the more logical way of equipping the student with the fundamental knowledge and the mental comprehension requisite for the study of the higher professions.

To no one is this statement more forcibly realized than it is to the lecturer in a law school who has in his classes, students, some who are college graduates, others who are without any collegiate training.

For, in the long run, the maintenance of a low standard of admission on the part of any law school simply means that, for those students who thereby secure admission to the curriculum of the law school course, just so much more time and effort must be spent by them, and in part, must be diverted from their law studies in order that they may be permitted to acquire that mental training and perceptiveness which will enable them to partially, at least, apprehend the work undertaken by them. But this is not all, for the burden is likewise thrown upon the instructor to spend that much of his time and effort as will give to this class of students the necessary fundamental enlightenment which must in many cases precede the apprehension of the legal study then being pursued, all of which shortens the time for the proper pursuit of the law work and retards the advancement of the

class as a whole. For it cannot be gainsaid that as full and complete a mental training is required for the apprehension of the law as for the comprehension of medicine or any other special branch of science.

Therefore, it is of primary importance that the standard of admission be made so high that the requisite preliminary training is first secured by the student: Otherwise, a law school must be a training school as well, unless it shall graduate students unprepared and ill fitted for their profession.

For without a high standard of admission the mere length of the law school course is no efficient criterion, comparatively, of the legal learning acquired by the student, though it be conceded that the relative merits of the corps of instrutors and the methods of instruction pursued by the same; since in one case where the students are without training it may well happen that a good portion of the time is taken in actual work of a training school, whereas in the other case, where the students have received a good preliminary training, more legal learning may have been imparted and received in the shorter course.

In fact, in the observation of the writer, it has occurred that a student with an excellent collegiate training has easily pursued and completed the three years' course of a certain Western law school in two years, and perhaps with less difficulty than many students complete the ordinary course in a law school whose term is two years.

It is apparent that the standard of admission for nearly all of the law schools of this country has been too low. This is admitted by the general efforts that are being made by all classes of law schools to raise the standard of admission, and by the further fact that something is being accomplished gradually in that direction.

However, the pertinent question in this respect is how the desired standard of admission can be attained.

The trouble very largely has been that a law school has been viewed by educators and by the layman also, too much from the commercial standpoint; the question of numbers has been considered in preference to the question of quality. In some cases it has been considered a matter of pride that a named school is self supporting. The question whether the College of Arts is upon a paying basis is immaterial, but it is worthy of comment and of complaint, in fact, if a law school is not paying its way through its attendance.

In this light, of course, they are not treated as a necessary educational agency of the state, but rather, as an adjunct much the same as a commercial course or a conservatory of music, added to give prestige to the institution by the additions of numbers without any expense thereto attached.

With this view in mind, it is readily observable why the University of Chicago is able to insist upon and require a collegiate training as a pre-requisite for admission to its law school, irrespective of the small numbers that it may have in attendance at its school by reason thereof, and why other law schools in Chicago and elsewhere in the United States have not yet been able to attain this standard of admission.

What reason can be urged why the law school should not be viewed as an essential educational agency of the state?

Expensive and elaborate departments are maintained generally by state and other educational institutions whereby experts in the sciences, in literature and in the ancient and modern languages are trained at the expense of the state with little expense on the part of the post graduate who desires to take such courses. Here, however, a high standard of admission is required.

The navel cadet at Annapolis, the army cadet at West Point, each is arduously trained at the expense of the nation in order that he may be fully equipped for its defense and protection. Here, again, a high standard of admission is required.

The lawyer is an officer of the state. The laws which govern our human actions and relations are just as important to the state as the laws affecting inert bodies, as the

laws concerning letters or philology, or as the laws which affect combatants at war. Is it not just as essential that the men who very largely frame, prosecute, interpret and enforce our laws should be as carefully educated, and the same requirements insisted upon as likewise apply to the other vocations mentioned.

But so long as the requisites for admission to the bar in the different states have little regard for the previous general training of the applicant it is, and will continue to be a difficult matter for the law schools of the country to enforce a higher standard of admission without the financial backing which will enable them to disregard the numbers in attendance and the revenues to be derived thereby.

It behooves the courts and the bars of the different states to call for and insist upon a gradual and increasing higher standard of admission until that standard is adopted which will give some assurance that the applicant for admission to the bar has not only the legal learning necessary, but also the fundamental training as well.

This can be accomplished by either requiring a collegiate training or providing for an examination along fundamental lines in lieu of it.

Now, as to the length of the law school course, when we look over our magnificent fields of jurisprudence, should it be said that a course of two years is all sufficient when we observe a four years' course required for a medical education, a three years' course required for a dental graduate, and at least as many years necessary in other courses along scientific lines.

Is that the comparative measure of our jurisprudence with the other sciences in point of comprehension?

Are we not compelled to conclude that the average student in a law school whose term is two years can get, at the best, only a rather hazy idea of the magnificent systems of the common law and the civil law and of our modern jurisprudence? Yet is it not proper, and almost essential, that there be a fundamental training along these lines if the school aims to add to the members of the bar a student fitted to become a finished lawyer?

As a matter of fact, the ordinary law course of two years encounters considerable difficulty in comprehending the modern legal precedents and the modern phases of the law with scant reflection on the fundamentals which have created them. For in this allotted time the modern divisions of the law as usually taught can scarcely be completed and the general principles underlying these subjects apprehended without regard to their sources and the causes that have brought them into existence.

It will not do to say that the student will find out what the law is, and how it must be applied when he acquires the experience of an active practice or that a lengthy course of training in schools makes a theoretical man, whereas a man who has learned by experience is practical and nearer the people.

Such arguments by their mere assertion deny the merits of scientific methods of teaching and training and, furthermore, it is too self evident from the lessons taught by our modern industrial and professional world that the scientifically taught mind and the well trained hand are the one that are rewarded with success.

It is well enough to say that the law graduate at his entrance into practice is but a mere apprentice who has yet to serve his time; that he can practice on the public, build up his store house of knowledge and glean from his older and learned contemporaries the legal lore that it is essential for him to acquire.

Yet, what incentive is afforded or what desire is fostered for such a student in his two year course to acquire fundamentals later, or to apprehend at a subsequent time the correlations of the various phases of the law? What opportunity has the struggling young lawyer busy with small cases and petty matters whereby his daily sustenance is gained, at his wits' end to understand the codified law of the state wherein he is practicing, the procedure and what

not, to take himself aside and view systematically the jurisprudence of his profession?

Has his two years' course taught him that this is necessary? Has it, in fact, even shown the way? Does not such a course, on account of its brevity, rather tend to discountenance such fundamental and research work and serve to produce the case lawyer, the man who is concerned with the precedent of yesterday for the needs of to-day with no formulative opinions for the morrow?

It possibly may be as suggested by Mr. Street in his recent article on this subject that plants are more rapid in their growth in tropical places and humankind is there more precocious both physically and mentally and that therefore in a Southern country it may well be expected that the period of school and college work shall end at a somewhat earlier age than in a country farther North.

However, we seriously doubt whether this justifies a two years' law course in the South as a measure of the precociousness of its student.

Upon the whole, the same length of time for mental training is required in one section of the country as in the other and in view of the great mass of statutory law, codified and not codified, and the vast numbers of judicial precedents, federal and state, that must necessarily be presented to the student for his assimilation and with which he is required to be familiar upon his admission to the bar, it is rather presumptuous to expect the law student in two years to apprehend the modern law as it exists to-day and to also acquire a fundamental education of our jurisprudence.

The latter is necessarily sacrificed for the former on account of the local and modern legal knowledge required for admission to the bar of the particular state.

Theological inference consequently follows that this fundamental education must be built up, if at all, by the student during the busy days of his actual practice and in a manner that is too apt to be haphazard and unscientific.

It is questionable whether the three years' law course is of sufficient length. The legal problems that are being presented to this nation to-day certainly require a special and well grounded training such as the best and most scientific methods can afford and, in this respect, the thought is worthy of notice that, if the bench, the bar, and the legal educators of the different states would co-operate in the establishing of both a higher standard of admission and a longer period of training both for the bar and the school, in this, the noblest of all professions and the one that requires the greatest mentality and learning, the bench and the bar would receive a higher tone and added dignity which would be reflected not only in better judicial precedents but in more intelligent legislation as well.

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PHYSICIANS AND SURGEONS — ACTION FOR MALPRACTICE—SUFFICIENCY OF EVIDENCE.

SAUERS v. SMITS.

Supreme Court of Washington, June 4, 1908.

In a malpractice suit against a physician, evidence held sufficient to take the case to the jury.

The fact that a patient discontinued the treatment of a physician before she should have done so, and thereby augmented an injury caused by the neglience or incompetency of the physician, did not preclude her recovery for the injury caused by the physician.

The fact that a patient did not follow a physician's instructions for treatment, and thereby suffered an injury, would not preclude her recovery for the physician's negligent or incompetent treatment.

RUDKIN, J.: This action was instituted to recover damages for malpractice. Without going into the details of the complaint, the substance of the plaintiffs' cause of action is that during the early part of the year 1906 the plaintiff Mrs. Sauers was suffering from an ailment of the foot, and applied to the defendant, who is a regularly licensed physician and surgeon, for treatment. The treatment prescribed and ad-

ministered consisted in the daily exposure of the affected member or part to the light and rays of an X-ray machine for a period of about a month, each exposure lasting from 15 to 30 minutes. After this course of treatment had continued for some two weeks, the foot began to swell, itch, and burn. The treatment continued for about two weeks longer, at the expiration of which time the entire left side of the foot from the toe to the heel was severely burned, so that the skin came off and a large angry sore, involving the whole side of the foot, was formed; and, by reason of the treatment prescribed, the foot is permanently injured, the patient has been rendered a cripple for life, and the injury will probably necessitate the amputation of the foot. The negligence charged is that the defendant failed to shield or protect the foot from the X-rays, that he should have discontinued the X-ray treatment as soon as the burning and scalding of the foot made its appearance, and that the tube or bulb of the X-ray machine was placed too close to the foot. Issue was joined on the complaint, and, from a judgment and verdict in favor of the defendant, the plaintiffs have appealed.

Two questions have been presented for the consideration of this court: First, the sufficiency of the evidence to warrant the submission of the case to the jury; and, second, the accuracy of one of the instructions given by the court. The testimony on the part of the appellants tended to show that there were 17 daily exposures of the foot to the X-ray machine, except on one date toward the last when the patient was unable to attend the hospital; that no shield was used to protect the foot from the X-rays; that the tube or bulb of the X-ray machine was placed not to exceed two or three inches from the foot; that the exposures after the first lasted from 25 to 30 minutes; that at the expiration of about two weeks from the first exposure the foot became very red and itched and burned, and that this condition grew gradually worse from day to day until the patient was no longer able to go to the hospital; that thereafter the respondent attended the patient once at the home of her brother-in-law, where she was stopping, but did not call on the following day, and another physician was called in; and that after the fifth exposure to the X-rays a medicated paste was spread over the affected part, which was about the size of a nickel. There was further testimony tending to show that at the close of the respondent's treatment there was an X-ray burn of the fourth degree on the foot which is generally considered incurable. It is unnecessary to refer to the testimony bearing upon the condition of the patient after this time as it would only go to the measure of damages, and that question is not before us. The testimony on the part of the respondent, on the other hand, tended to show that the number of exposures was about 10; that the tube or bulb was placed from 4 to 6 inches from the foot; that the exposures occurred only every other day, and lasted from 8 to 18 minutes; that the red or burnt appearance of the foot was caused by the paste, and not by the X-rays; that the patient had used her foot contrary to instructions, and by reason thereof the paste spread from the affected part to other parts of the foot; that there was no X-ray burn of any kind; that the treatment was proper; and that at the time of the trial the foot was entirely cured, and in a healthy condition. There was further testimony on the part of the respondent tending to show that the X-ray is comparatively a new discovery, and was not well understood by physicians and surgeons practicing in such communities as Aberdeen at the time this treatment was given. The appellants denied that the patient had disobeyed instructions, or that the paste had spread from the affected part to other portions of the foot, or that the condition of the foot was caused by the paste. It will thus be seen that there was a direct conflict in the testimony on many essential points. The jury would have been authorized in finding that the injured foot was severely burned by the X-rays, that the treatment was improper, and that the injury was caused by one or more of the acts of negligence charged in the complaint. If it should appear that physicians and surgeons in such communities as Aberdeen were as ignorant of the effect of X-ray exposures as some of the testimony tends to show, the jury might well conclude that the use of such a dangerous agency by one who had little or no knowledge as to the probable consequences was negligence per se. We are satisfied, therefore, that the motion for a nonsuit and the motion for a directed judgment were properly denied.

The instruction complained of by the appellants is as follows: "If you find from the evidence that the patient quit the treatment of the defendant before she should have done so, and before he was willing she should quit him, and that any evil results have come from that action on her part, then she would not be entitled to recover. If you believe that the defendant gave her directions as to how she should act, and as to how she should treat her foot, how she should use it and take care of it during the time she was treating it, and she did not follow those directions with reasonable care and diligence upon her part, and any injury has resulted on account of that negligence or want of attention or care upon her part, then

she would not be entitled to recover." This instruction was erroneous. If we assume that the patient quit the treatment of the respondent before she should have done so, and before he was willing that she should quit him, or that she neglected to follow instructions as to how she should use and care for the foot, and injury resulted by reason thereof, the fact remains that these acts of negligence on the part of the patient in no manner concurred with the act of the respondent in burning the foot, if he did so. It would be a harsh doctrine to say that a patient cannot recover for malpractice if any subsequent or independent act of negligence on her part increases or augments the injury caused by the negligence or incompetency of the attending physician; and such is not the law. As said by Agnew, C. J., in Gould v. McKenna, 86 Pa. 297, 27 Am. Rep. 705: "The contributory negligence which prevents recovery for an injury is that which co-operates in causing the injury—some act or omission concurring with the act or omission of the

Notes of important decisions

other party to produce the injury (not the loss merely), and without which the injury would not have happened. A negligence which has no operation in causing the injury, but which merely adds to the damages resulting, is no bar to the action, though it will detract from the damages as a whole." In Beadle v. Paine, 46 Ore. 424, 80 Pac. Rep. 906, the court said: "But it will not suffice to defeat the action that the injured party was subsequent negligent, and thereby conduced to the aggravation of the injury primarily sustained at the hands of the physician or surgeon, and such conduct on the part of the patient is pertinent to be shown in mitigation of damages only where enhanced thereby, but not to relieve against the primary liability." See, also, Carpenter v. Blake, 75 N. Y. 12; Du Bois v. Decker, 130 N. Y. 325, 29 N. E. Rep. 313, 14 L. R. A. 429, 27 Am. St. Rep. 529; Wilmot v. Howard, 39 Vt. 447, 94 Am. Dec. 338; Thompson on Negligence, § 201; 22 Am. & Eng. Ency. of Law, 407. The statement that any injury resulting from the negligent acts of the patient would bar a recovery was also too favorable to the respondent. We are therefore of opinion that there was sufficient evidence of negligence on the part of the respondent to go to the jury, and that the instruction complained of was erroneous.

For this error, the judgment is reversed and a new trial ordered.

Note—Physicians and Surgeons—Malpractice—Negligence.—The physician is bound to use "ordinary," "reasonable" or "proper" care and skill. These terms, however, mean practically the same thing, legally, and require such care and skill as would be exercised by the ordinarily prudent physician in like cases in the same neighborhood. The physician and surgeon practicing in a sparsely settled rural district is not held to the same degree of skill as the physician practicing in a large city. The physician is not liable for want of the highest degree of skill (Howard v. Grover, 28 Me. 97), but for the exercise of ordinary skill; he cannot be required to use his full skill and ability, but only the skill possessed by the average prudent practitioner under like circumstances, in the neighborhood, or similar locality. Quinn v. Donovan, 85 Ill. 194. It has been held that the degree of care and skill required in the performance of a surgical operation is that reasonable degree of care and skill that physicians and surgeons ordinarily exercise in the care of their patients. Janney v. Housekeeper, 70 Md. 162. A physician must exercise a reasonable degree of care and professional skill, and what that is must be determined in each case from the circumstances. And regard is to be had to the advanced state of the profession at the time. Braunberger v. Cleis (Pa), 4 Am. L. Reg. (N. S.) 587.

The liability of the physician and surgeon attaches where he fails and neglects to exercise the degree of care and skill ordinarily exercised by physicians under like circumstances in the community or in similar communities. He also would be liable in cases where injury had resulted from prescriptions improperly given containing injurious ingredients; he would also be liable for neglect or failure to visit a patient as the exigencies of the case might require while under his care, and his liability continues until his professional relationship terminates.

While it is not the policy of the law to throw obstacles in the path of progress yet new devices and methods of treatment must be used with caution. In the principal case the destructive effects of the X-ray burn were apparent long before the treatment was discontinued and the physician should have recognized this danger signal and discontinued the treatment. Failing to watch the indications and conduct the treatment accordingly is held to be negligence. As is well said, the Roentgen Ray is an agency which is little understood but known to be dangerous under certain conditions. At the time of treatment this was the state of knowledge with regard to X-ray therapy and therefore this agency should have been used with great caution. See Mitchell v. Hindman, 47 Ill. App. 431. Affirming 150 Ill. 538; Gobel v. Dillon, 86 Ind. 327; Carpenter v. McDavitt, 53 Mo. App. 393. The cases on this subject are presented in a note to Whitsell v. Hill, Iowa, reported in 37 L. R. A. 830.

NEWS ITEM.

ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION.

The thirty-first annual meeting of the association will be held at Seattle, Washington, on Tuesday, Wednesday, Thursday and Friday, August 25, 26, 27 and 28, 1908.

The sessions of the association will be at 10 o'clock a. m. and 8 o'clock p. m. on Tuesday, Wednesday and Thursday, and at 10 o'clock a. m. on Friday. The sessions of the section of

legal education will be on Wednesday and Thursday afternoons, August 26 and 27, at 3 o'clock p. m. The sessions of the section of patent, trade-mark and copyright law will be on Tuesday and Wednesday, August 25 and 26, at 3 o'clock p. m.

On Monday, August 24, at 3 o'clock p. m., there will be a meeting of the comparative law bureau. On Tuesday, August 25, at 3 o'clock p. m., and on such other dates as may be determined upon at Seattle, there will be meetings of the association of American law schools. The eighteenth conference of commissioners on uniform state laws will begin its sessions on Friday, August 21, at 10 o'clock a. m., being Friday of the week previous to the meeting of the American Bar Association.

The place of holding the various meetings will be announced at Seattle. The reception room will be at the New Washington Hotel.

Programme of the Association.

Tuesday morning, 10 o'clock.—The president's address, by J. M. Dickinson, of Illinois, communicating the most noteworthy changes in statute law on points of general interest, made in the several states and by congress during the preceding year. Nomination and election of members, election of the general council, report of the secretary, report of the treasurer, report of the executive committee,

Tuesday evening, 8 o'clock.—A paper by C. H. Hanford, United States District Judge for the District of Washington, on "National Progression; and the Increasing Responsibilities of Our National Judiciary." A paper by Edgar H. Farrar, of Louisiana, on "The Extension of Admiralty Jurisdiction by Judicial Interpretation." Discussion upon the subjects of the papers read.

Wednesday morning, 10 o'clock.—The annual address by George Turner, ex-United States Senator from the State of Washington. Reports of standing committees. (See report of 1907, page 877, giving a memorandum of subjects referred): On Jurisprudence and Law Reform, On Judicial Administration and Remedial Procedure, On Legal Education and Admissions to the Bar, On Commercial Law, On International Law, On Grievances, On Obituaries, On Law Reporting and Digesting, On Patent, Trade-mark and Copyright Law, On Insurance Law, On Taxation, On Uniform State Laws, Report of Comparative Law Bureau.

Wednesday evening, 8 o'clock—A paper by Frederick Bausman, of Washington, on "Whether Our Laws are Responsible for the Increase of Violent Crime." Discussion upon the subject of the paper read. Unfinished standing committee reports.

Thursday morning, 10 o'clock.—Unfinished standing committee reports. Reports of special committees. (See report of 1907, page 878): On Classification of the Law, On Indian Legislation, On Penal Laws and Prison Discipline, On Federal Courts, On Title to Real Estate, On Code of Professional Ethics, On Proposed Copyright Bill, On Proposed Lawyers' Home. To suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation.

Thursday evening, 8 o'clock.—Unfinished special committee reports.

Friday morning, 10 o'clock.—Nomination of officers, unfinished business, miscellaneous business, election of officers.

The annual dinner will be given by the association at 8 o'clock on Friday evening. A charge of $5 for dinner tickets will be made to each member and delegate.

A room in the New Washington Hotel will be open as a reception room for the use of members of the association and delegates during the meeting.

Entertainment.

At the conclusion of the meetings a two-days' trip will be given to the members and delegates around Puget Sound, the Bay of Georgia and the Straits of Juan de Fuca, stopping at Vancouver, Victoria, Port Angeles, Port Townsend and Tacoma.

Hotel Accommodations.

The New Washington Hotel, Second avenue between Stewart and Virginia streets, will be ready as the place of meeting but not for the accommodation of guests. The principal hotels are the Butler, Butler Annex, Savoy, Rainier Grand, Perry and Lincoln. All the hotels are conducted on the European plan.

Mr. Walter McClure, whose address is Alaska Building, Seattle, Washington, is chairman of the committee on accommodations. Reservations should be made several weeks in advance.

Programme of the Section of Legal Education.

The sessions will be held on Wednesday and Thursday afternoons, August 26 and 27, at 3 o'clock.

Wednesday afternoon.—Address by the chairman of the section, Samuel Williston, Professor of Law, Harvard Law School, on "The Necessity of Idealism in Teaching Law." A paper by William Schofield, Justice of the Superior Court of Massachusetts, on "The Relation of the Law Schools to the Courts." Discussion upon the subjects of the papers read.

Thursday afternoon.—A paper by Karl von Lewinski, Amstrichter, Berlin, on "The Education of a German Lawyer." A paper by Andrew A. Bruce, Dean of the College of Law, University of North Dakota, and Chairman of the North Dakota Board of Bar Examiners, on "The Relation of State Bar Examiners to the Law School and the Cause of Legal Education." Discussion upon the subjects of the papers read.

Programme of the Section of Patent, Trade-Mark and Copyright Law.

The sessions will be held on Tuesday and Wednesday afternoons, August 25 and 26, at 3 o'clock. Address of the chairman, Robert S. Taylor, of Fort Wayne, Indiana. A paper will be read by Wallace R. Lane, of Des Moines, Iowa, on "Certain Phases of a Patentee's Prima Facie Rights. I. On Demurrer for Want of Patentability. II. As to Circularizing in Patent Litigation." Papers will also be read by J. Nota McGill of Washington, District of Columbia, and Douglas Dyrenforth of Chicago, Illinois. A discussion on the papers will follow.

Programme of the Comparative Law Bureau.

The first annual meeting will be held at the New Washington Hotel, Seattle, Washington, on Monday, August 24, at 2.30 o'clock p. m. Annual address of the director, Simeon E. Baldwin, of New Haven, Connecticut. Reading of report to American Bar Association. Germane topical discussions. Membership and participation at the meeting are classified as follows: Class A. All members of the American Bar Association. Class B. State Bar Associations, by three delegates each. Class C. Members of the Association of American Law Schools, by two delegates each. Class D. Law schools and law libraries, by two delegates each. Class E. Institutions

of learning, city and county bar Associations, by two delegates each. Class F. Individual lawyers who are not members of the American Bar Association, by personal attendance.

Programme of the Association of American Law Schools.

The ninth annual meeting will be held at the New Washington Hotel, Seattle, Washington, on Tuesday, August 25, 1908, and and such other dates as may be there determined upon. Annual address of the president of the Association of American Law Schools, by George W. Kirchwey, Dean of the Columbia University Law School. A paper by Dr. David Starr Jordan, President of the Leland Stanford, Jr., University, on "The Relation of the Law School to the University." Discussion upon the subjects of the papers read. Business meeting of the association.

Conference of Commissioners on Uniform State Laws.

The eighteenth conference will be held at the New Washington Hotel, Seattle, Washington, beginning August 21, 1908, at 10 o'clock a. m. All members of the American Bar Association, and particularly the members of the Committee on Uniform State Laws of the American Bar Association, as well as the representatives of commercial or other bodies, interested in uniform laws relating to bills of lading, stock certificates, partnership or any other uniform laws which may be the subject of consideration by the conference, are cordially invited to attend and to take part in the preparation, examination and discussion of bills relating to those matters.

JETSAM AND FLOTSAM.

POETRY AND THE LAW.

A copy of the opinion of the Supreme Court of Missouri in the case of Mancil G. Cook v. Laura A. Newby and others, has just reached Trenton, in which opinion Judge Lamm, in the course of the written opinion of the Supreme Court, discloses his peculiar literary attainments, which have adorned so many of the recent opinions of the Supreme Court of Missouri.

This case involved the ownership of 120 acres of valuable land near McFall, Gentry county, Missouri. This farm had been conveyed by a warranty deed to Laura A. Newby and her husband, John H. Newby. At the trial in the Circuit Court Judge W. C. Ellison set aside the deed to the Newbys and decided that Mancil G. Cook was the owner of this farm.

The Supreme Court reversed this decision of Judge Ellison and remanded the case, with directions to enter a judgment in favor of the Newbys.

In discussing the briefs of the attorneys, Judge Lamm used the following language:

"We now come to a phase of the case, eyed at first a little askance, and then critically. Whatever value it has is in showing how one taper lights another in briefs, as in the world at large. It shows, too, how difficult in a close matter it is to determine the proximate cause of things—or the probable result of a given cause. Possibly, its force is somewhat spent in disclosing what hidden pitfalls lurk in the primrose paths diverging from the beaten way in brief-making for appellate courts. As wayfarers in the main-traveled highway of the law we shall set it down to point its own moral, thus:

Appellants' scholarly counsel close a good brief in chief with a short and modest flight of fancy—a borrowed apostrophe to Justice—by poetical license dressed in singular phrase, viz.: 'For Justice

All place a temple, and all season summer.'

"Now, prima facie, is this aught but an innocent and mild invocation to serenity of judicial temper? Is it more than a wholesome effort to key up the mind of the court to a notch of high thinking? Inquiring students in the law recall the unexpected and anxious result produced by throwing the squib in the celebrated Squib case. But mark the novel result here. The very innocency of the apostrophe's face was taken as a mask hiding evil contrivances. So it was that the very blandness of the countenance of Mr. Harte's 'Heathen Chinee' (in the case of William Nye) hid like evil. Apparently nettled by its use, learned counsel for respondent condemn appellants' brief by and large. Bethinking themselves of the time when Iago tripped good Michael Cassio into mischief by a night's revel, they designate the brief in Cassio's description of the events of that woeful night as, viz.:

'A mass of thinges . . but nothing wherefore.'

Not only so, but counsel fall upon the (to us) unknown author of the apostrophe with heated epithet. They belabor him roundly, though dead. They say he was the 'great agnostic and prince of plagiarists.' They say the first part of the apostrophe was 'cribbed from a heathen poet' without giving due credit. They say its concluding phrase is of such 'occult meaning that no one so far as our knowledge extends has had the hardihood to asseverate that it is within his ken.'

They conclude a trenchant and sprightly printed argument with a beautiful poetical apostrophe to the Bible, most becoming and tenderly reverential, and then (by way of sharp contrast) darkly hint that appellants' apostrophe comes from a sinister source, to-wit. Pain, Volney or Voltaire—winding up by laying down certain sacred ethical precepts, which, they insist, announce the right doctrine to apply to the facts of the record.

Thus sorely pricked, appellants' counsel (drawing from the well of the drama) retort in their reply brief in the words of Bassanio's comment on the caskets (made to himself—see Merchant of Venice, Act III, sec. 2) viz:

'In law, what plea so tainted and corrupt,
But, being seasoned with a gracious voice,
Obscures the show of evil? In religion
What damned error but some sober brow
Will bless it, and approve it with a text,
Hiding the grossness with fair ornament.'

So much, for the matter. We take leave of it with this observation: Whatever the issue raised, it is not one of fact or law. We refuse to meddle with it on this appeal, and hence, leave it to a forum, if any, having jurisdiction to try it out."

BOOK REVIEWS.

BEVAN ON THE LAW OF NEGLIGENCE.

The author, Thomas Bevan, of the Inner Tem-

ple, Barrister-at-Law, states that the preparation of this revision has occupied the greater portion of his time for some three or four years, and that he has not only sought to bring his treatise up to date, but to present the new problems which have now to be dealt with. As to the importance of this branch of law, and its development, the author speaks as follows: "Discussions on questions of negligence are of daily occurrence in the courts; since the tendency of the law freed from technical fetters is to base claims on breach of duty rather than on some more refined or recondite reason; while the increasing complexity of social relations in modern life accentuates immensely the occasions of conflict, whether intentional or not, between those whose interests or rights are converging but not identical. A large proportion of, though not nearly all, the 1,465 new cases introduced into this book, is due to this expansion of the subject and is the growth of ten years of active legal work. The residue is to be put down to what was improvidently omitted before, or what is material for new exemplification or is of historical interest."

There is in all the law no more interesting a study than that of the law of negligence, certainly none more important. This branch of law, necessarily restricted and obscure in its origin, has developed with our advancing civilization. It is only in the last few decades, however, that it has forged to the front as one of the most important branches of the law. This has been due to the great industrial expansion of recent times. The old principles have been applied to new conditions, have been refined and expanded, and in some instances, laid aside, or repudiated as not being applicable to present day conditions.

The author of this work has stated the principles clearly, and has shown their origin, expansion and growth to the present day.

The presentation is scholarly, the arrangement logical. While he cites and quotes freely from the adjudicated cases, he has not fallen a victim of the case law habit, but presents the law as it is, criticising the adjudication where necessary and contrasting and analyzing.

While the author is an Englishman, his effort has been to present the Law of Negligence of England, America and the Colonies. He recognizes the high standing of the American courts and cites their decisions freely.

The frequency with which questions involving a consideration of this branch of the law are being raised, renders a treatise of this character a necessity to the practicing attorney. Bevan's book has long been recognized as an authority on this subject. It is in two volumes. Published by Cromarty Law Book Co., Philadelphia.

STIMSON ON FEDERAL AND STATE CONSTITUTIONS.

Those familiar with previous books by this author need no introduction. Professor Stimson is thoroughly qualified to discuss the great subject of constitutional law. In this treatise the subject is presented in a scholarly, concise, and forceful style. The anaylsis gives an excellent idea of the correlation of the various constitutional provisions, which are also presented in their historical aspect, thereby giving the development and growth of constitutional law. There is a historical study of the chronological origin of the several provisions, also a table of English social legislation, and a comparative digest of the constitutions of the forty-six states. The effort of the author has been to give the history, origin and present tendency of American constitutions. The thoughtful lawyer must realize that constitutional law is not a dead study, but is a branch of law of the utmost importance, which has been too much neglected in the past. A considerable portion of the litigation now reaching our higher courts involves questions of constitutional law. While decisions of great import have been handed down from time to time, there are great problems yet to be solved.

Professor Stimson has succeeded in treating this subject in one volume and is to be commended for having done such thorough and able work in such a brief compass. The work should be of greater value by reason of its brevity, as the foundation principles are presented in a space that will permit the book to be carefully read by even the busy practitioner.

The book is by Prof. Frederic Jesup Stimson and is published by the Boston Book Company, Boston, Mass.

BOOKS RECEIVED.

A Treatise on Fraudulent Conveyances and Creditors' Remedies at Law and in Equity, including a consideration of the provisions of the bankruptcy law applicable to fraudulent transfers and the remedies therefor, and the procedure of trustees in bankruptcy in actions either in state or federal courts for the recovery of property fraudulently transferred by the bankrupt. By DeWitt C. Moore, of the Johnstown (New York) Bar, Author of "The Law of Carriers." In Two Volumes. Albany, N. Y.: Matthew Bender & Co. 1908. Buckram. Price $12.00, Review will follow.

The Treaty Power under the Constitution of the United States. Commentaries on the Treaty Clauses of the Constitution; construction of treaties; extent of treaty-making power; conflict between treaties and acts of Congress; state constitutions and statutes; international extradition; acquisition of territory: ambassadors, consuls and foreign judgments; naturalization and expatriation; responsibility of government for mob violence, and claims against governments. With Appendices containing regulations of department of state relative to extradition of fugities from justice, a list of the treaties in force, with the international conventions and acts to which the United States is a party, and a chronological list of treaties. By Robert T. Devlin, of the San Francisco Bar, Author of "A Treatise on the Law of Deeds." San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1908. Sheep. Price $6.00. Review will follow.

The Commerce Clause of the Federal Constitution. By Frederick J. Cooke, of the New York Bar. Author of "The Law of Life Insurance," "The Law of Trade and Labor Combinations," etc. New York. Baker, Voorhis & Company. 1908. Buckram. Price $4.50. Review will follow.

Cyclopedia of Law and Procedure. William Mack, LL. D., Editor-in-Chief. Volume XXVIII. New York. The American Law Book Company. London: Butterworth & Co., 12 Bell Yard. 1908. Review will follow.

The American State Reports, containing the Cases of General value and authority subsequent to those contained in the "American Decisions"

and the "American Reports," decided in the courts of last resort of the several states. Selected, Reported and Annotated by A. C. Freeman. Volume 119. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1908. Review will follow.

HUMOR OF THE LAW.

Speaking of the perversity of country "squires," State Senator John S. Fisher, chairman of the Pennsylvania Capitol Investigation Commission, told this story recently:

"We have one old codger out in Indiana county who fears neither lawyer nor court. Not long ago Dick Wilson had a case before the 'squire,' and, knowing his man, he went to the office fortified with a dozen or more Supreme Court decisions.

"Wilson argued his case, cited several opinions, and finally remarked: 'Squire, I have here some decisions by the Supreme Court of Pennsylvania which I shall read.'

"Wilson finished one decision when the justice interrupted, saying:

"'Mr. Wilson, I reckon you've read enough. Those Supreme Court decisions are all right so far as they go, but if the Supreme Court has not already reversed itself I have no doubt that it will do so in the near future. Judgment is therefore given against your client.'"—Philadelphia Public Ledger.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

California, 4, 10, 11, 14, 25, 35, 41, 51, 64, 70, 72, 83, 93, 96, 98, 103, 106, 113, 127, 130, 136.
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Wyoming 5, 20, 52, 61, 99, 100, 141

1. **Acknowledgment**—Persons Entitled to Take.—A deed of trust by a corporation, acknowledged before a notary public who was an officer thereof and indebted to it, held entitled to registration.—Ardmore Nat. Bank v. Briggs Machinery & Supply Co., Okl., 94 Pac. Rep. 533.

2. **Account Stated**—Estoppel.—An account stated held not conclusive unless the account is affected by a consideration or by an estoppel.—Segelke & Kohlhaus Mfg. Co. v. Vincent, Wis., 115 N. W. Rep. 806.

3. **Action**—Legal and Equitable.—An equitable cause of action may be united with a legal cause of action.—Disbrow v. Creamery Package Mfg. Co., Minn., 115 N. W. Rep. 751.

4. **Adjoining Landowners**—Excavations.—The fact that the owner of a building undertook to construct a foundation wall under it to comply with the requirements of a city ordinance did not release the adjoining landowner, who undertook to construct a wall by the side of it extending from six to nine feet deeper, from the duty to so construct his wall as to retain the premises on which the building stood.—Hedstrom v. Union Trust Co., Cal., 94 Pac. Rep. 386.

5. **Appeal and Error**—Bill of Exceptions.—It is only after an order has been made requiring a rearrangement and numbering of the pages of a transcript, and that order has not been complied with, that the cause will be dismissed in the discretion of the court on the ground that the pages of the transcript are not properly arranged and numbered.—Weidenhoft v. Primm, Wyo., 94 Pac. Rep. 453.

6.——Damages.—Defendant, in an action for injuries to a child caused by being struck by a street car, held not entitled to a reversal, because of the court's failure to instruct the jury that they must limit plaintiff to such loss of earning capacity as would ensue after he had reached his majority.—Rollo v. City Electric Ry. Co., Mich., 115 N. W. Rep. 727.

7.——Dismissal.—Where appeal of original appellant from a decree necessarily determines all the questions presented by the record, a motion to dismiss as to other appellants will not be considered.—Whedon v. Lancaster County, Neb., 114 N. W. Rep. 1102.

8.——Harmless Error.—Any error in sustaining a demurrer to an affirmative defense is harmless where the only evidence defendant could introduce thereunder is admissible under the general denials.—Owen v. Casey, Wash., 94 Pac. Rep. 473.

9.——Instructions.—Where plaintiff's counsel made a statement in argument, which defendant objected to, and asked the court to instruct the jury to ignore, but did not except to the court's failure to do so, the question may not be considered on appeal.—Bennett v. Greenwood, Mich., 114 N. W. Rep. 1019.

10.——Negligence.—In an action for personal injuries resulting from the alleged negligence of defendant in maintaining dangerous premises, on the question whether defendant violated any duty it owed to plaintiff, the court will consider the case in the light of the inferences most favorable to plaintiff's contention for which there is substantial support in the evidence.—Grant v. Sunset Telephone & Telegraph Co., Cal., 94 Pac. Rep. 368.

11.——Pleading.—Where the complaint is uncertain, but it is apparent from the record that defendants were not thereby misled or embarrassed in making their defense, the overruling of a demurrer in the complaint is not ground for reversal.—Hudner v. Sawday, Cal., 94 Pac. Rep. 424.

12.——Questions of Fact.—A verdict on conflicting testimony will not be disturbed on appeal, unless it is clearly wrong.—Stratton Cripple Creek Mining & Development Co. v. Ellison, Colo., 94 Pac. Rep. 303.

13.——Scire Facias.—Where a writ of scire facias is asserted to have been issued within ten years after the cause of action accrued, the supreme court cannot say that petition for revival after such time is an amendment of such writ, or a continuation of such action, when neither the writ nor the terms thereof are set out in the record.—Noyes v. French, Okl., 94 Pac. Rep. 546.

14.——Theory of Cause.—Where an issue of agency was tried in good faith without objection in the trial court, a judgment would not be reversed because such issue was not tendered by the complaint.—Mabry v. Randolph, Cal., 94 Pac. Rep. 403.

15. **Appearance**—Proceedings Constituting.—Defendant by pleading the general issue thereby submits himself to the court's jurisdiction, and, even though a plea in abatement as to other defendants is sustained, it does not affect the jurisdiction as to him.—Rosenthal v. Rosenthal, Mich., 115 N. W. Rep. 729.

16.——General and Special Appearance.—A motion by defendant to amend the return to the summons to conform to the facts held inconsistent with want of jurisdiction of his person by the court so as to amount to a general appearance.—Bestor v. Intercounty Fair, Wis., 115 N. W. Rep. 809.

17. **Attorney and Client**—Contract for Services.—An agreement between a client and his attorneys for services of the latter, wherein it is agreed that the client shall not settle or otherwise dispose of the cause of action without the written consent of the attorneys, is contrary to public policy, and void.—Kansas City Elevated Ry. Co. v. Service, Kan., 94 Pac. Rep. 262.

18. **Bail**—Deposit in Lieu of Bail.—The court held not authorized to require one disbursing cash bail by the authority of accused to pay the money into court for the benefit of another.—State v. Wisnewski, Wis., 114 N. W. Rep. 1113.

19. **Banks and Banking**—Checks.—A check is not an assignment of the corresponding amount of the drawer's fund in the hands of the bank, and gives the payee no right of action against the same.—Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank of Sharpsburg, Pa., 69 Atl. Rep. 280.

20.——Compensation of Receiver.—In a suit by the state to dissolve a bank under Rev. St. 1899, sec. 3101, the court held not entitled to fix the entire compensation of the receiver until all the services had been performed, and his final report approved.—Riordan v. Horton, Wyo., 94 Pac. Rep. 448.

21. **Bastards**—Credibility of Complainant.—In bastardy, the question whether complainant resisted accused to the degree testified to by her held to affect her credibility only.—Douglass v. State, Wis., 114 N. W. Rep. 1121.

22. **Bills and Notes**—Negotiability.—A stipulation on the back of a note at execution that it was secured by a mortgage, and that the payee would look to mortgage security for its payment, became a part of the note, and rendered it non-negotiable.—Allison v. Hollembeak, Iowa, 114 N. W. Rep. 1059.

23.——Presentment.—Drawer of a check, not having been accepted as unconditional payment, is liable to the owner, where by its loss presentment to the bank is rendered impossible.—First Nat. Bank v. McConnell, Minn., 114 N. W. Rep. 1129.

24. **Cancellation of Instruments**—Fraud.—In an action for rescission and cancellation of a deed fraudulently obtained, an allegation that plaintiffs are ready and willing to execute a deed to the land traded for to defendants is a sufficient offer to restore within Wilson's Rev. & Ann. St. 1903, sec. 827.—Clark v. O'Toole, Okl., 94 Pac. Rep. 547.

25.——Laches.—Though a suit to rescind certain instruments on the ground of fraud was not brought until almost a year after plaintiff's discovery of the fraud, the delay held not laches, under Civ. Code, sec. 1691.—Richards v. Farmers' & Merchants' Bank, Cal., 94 Pac. Rep. 393.

26. **Carriers**—Carriage of Freight.—A carrier in accepting shipments accepts them subject to the liabilities imposed by law; and the only way in which it can vary the liability is by special contract.—Russell v. Chcago, B. & Q. Ry. Co., Mont., 94 Pac. Rep. 488.

27.——Injury to Alighting Passenger.—Where a passenger is unable to leave the car without assistance and the conductor promises to assist her, the company will be liable for injuries sustained in her attempt to leave the car without assistance.—Mercer v. Cincinnati Northern R. Co., Mich., 115 N. W. Rep. 733.

28. **Champerty and Maintenance**—Grants of Land Held Adversely.—Under 1 Wilson's Rev. & Ann. St. 1903, sec. 2111, making a person taking a conveyance of land while the same is the subject of a suit guilty of a misdemeanor, a deed held not void unless the person taking the same knew of the suit.—Jennings v. Brown, Okl., 94 Pac. Rep. 557.

29. **Commerce**—Soliciting Orders.—Soliciting orders or making a contract for the sale of goods in one state, and which by the order or contract are to reach the purchasers in another, held an inherent part of the commerce consisting of the whole transaction.—Loverin & Browne Co. v. Travis, Wis., 115 N. W. Rep. 829.

30. **Conspiracy**—Contract Induced by Conspiracy.—In an action to recover money paid on a contract which defendants wrongfully conspired to induce plaintiff to make, it was immaterial by which one of defendants she was actually influenced in making the contract.—Aughey v. Windrem, Iowa, 114 N. W. Rep. 1047.

31.——Evidence.—In a suit for conspiring to prevent plaintiff's husband from living with her until she redeeded land deeded to her in settling a suit for alienation of her affections, what was said and done between defendants at the time of such settlement held admissible to show they were acting together.—Rosenthal v. Rosenthal, Mich., 115 N. W. Rep. 729.

32. **Constitutional Law**—Equal Protection of the Law.—Act April 5, 1906 (P. L. 1906, p. 121), held not to violate the fourteenth amendment of the federal constitution.—United New Jersey R. & Canal Co. v. Parker, N. J., 69 Atl. Rep. 239.

33.——Privileges and Immunities.—The power to impose conditions on granting to a foreign corporation the privilege of doing busi-

ness in a state held not restrained by Const. U. S. Amend. 14, sec. 1, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.—Loverin & Browne Co. v. Travis, Wis., 115 N. W. Rep. 829.

34. **Contracts**—Agreement for Benefit of Third Party.—Where a contract is made for the benefit of a third party, he may enforce it when he is informed of its existence, whether he was ascertained when the contract was made or not.—R. Connor Co. v. Olson, Wis., 115 N. W. Rep. 811.

35.——Construction.—Where a pleaded instrument is, because of the uncertainty of its language, susceptible of more than one construction as to its nature or as to the purpose intended by the parties to be attained by it, the construction of the party pleading it should be accepted, if such construction be reasonable, where the essential facts stated in the complaint are at least pro re nata admitted to be true.—Richards v. Farmers' & Merchants' Bank, Cal., 94 Pac. Rep. 393.

36. **Counties**—Criminal Prosecutions.—Where a change of venue is taken in a criminal case, and the county from which the change is made is liable to the county to which the change is made for expenses incurred, and the commissioners of the county in which the trial was had have paid fees and expenses, it may maintain an action against the other county to recover therefor.—Board of Commissioners of Cheyenne County v. Board of Commissioners of Norton County, Kan., 94 Pac. Rep. 278.

37. **Courts**—Adjudications.—The court of appeals, where the question involved is one depending entirely on the evidence, will merely announce its conclusion.—McCabe v. Brosenne, Md., 69 Atl. Rep. 259.

38.——Stare Decises.—Where a rule as to a matter of form and procedure has been adopted in former decisions of the supreme court, it should be followed.—Murphy v. Willow Springs Brewing Co., Neb., 115 N. W. Rep. 761.

39. **Criminal Law**—Disorderly Houses.—The keeper of a disorderly house who enters into a criminal agreement with a public officer to pay certain money at stipulated times as a consideration for carrying on his business held an accomplice.—State v. Routzahn, Neb., 115 N. W. Rep. 759.

40.——Parties Entitled to Allege Error.—Where a tenant and his landlord were charged with maintaining a nuisance, and the evidence showed the tenant alone guilty, error in convicting the tenant jointly with the landlord was not prejudicial to the tenant.—People v. Kent, Mich., 114 N. W. Rep. 1012.

41.——Time for Taking Appeal.—Under Pen. Code, secs. 1239, 1240, held that an appeal may be taken before the judgment or order appealed from is entered.—People v. Schmitz, Cal., 94 Pac. Rep. 407.

42. **Criminal Trial**—Instructions.—Where the only witnesses to the commission of an offense by accused were accomplices, the court erred in refusing to give a cautionary instruction as to their credibility.—O'Brien v. People, Colo., 94 Pac. Rep. 284.

43.——Remarks of Counsel.—Where no particular language of the counsel for the state in his argument in bastardy was called to the attention of the court, no reversible error on the ground of improper remarks was shown.—Douglass v. State, Wis., 114 N. W. Rep. 1121.

44.——Venue.—An indictment for murder after the admission of Oklahoma for an offense committed under the territory held cognizable in the district court in the county in which the offense was committed, under Const. Schedule, secs. 27, 28, and Enabling Act June 16, 1906, sec. 20, c. 3335, 34 Stat. p. 277, as amended by Act March 4, 1907, c. 2911, 34 Stat. p. 1287.—Ex parte Bailey, Okl., 94 Pac. Rep. 553.

45. **Damages**—Anticipated Profits.—Anticipated profits may be allowed as damages on the breach of contract, where the business is not a new one, and a safe basis can be found on which to estimate them.—Fredonia Gas Co. v. Bailey, Kan., 94 Pac. Rep. 258.

46.——Failure to Submit to Physical Examination.—In actions for personal injuries, an order of the court directing plaintiff to submit to a physical examination before the trial will be enforced by staying or dismissing the action, and not by punishment as for contempt.—Western Glass Mfg. Co. v. Schoeninger, Colo., 94 Pac. Rep. 342.

47.——Temporary Injury to Real Estate.—Where injury to real estate is only temporary and removable, depreciation in the market value of the land cannot be considered.—Doremus v. City of Paterson, N. J., 69 Atl. Rep. 225.

48. **Death**—Negligence.—In an action for the death of one killed by falling rocks while descending a manway in a mine, evidence held to support a finding that decedent was killed by falling rock because of negligence of the employer to properly timber up the way.—Hotchkiss Mt. Mining & Reduction Co. v. Bruner, Colo., 94 Pac. Rep. 331.

49. **Deeds**—Undue Influence.—Where a grantor is capable of understanding the nature and consequence of his conveyance, mere weakness of mind, not taken advantage of by fraud or undue influence, is insufficient to justify setting it aside.—Altig v. Altig, Iowa, 114 N. W. Rep. 1056.

50. **Descent and Distribution**—Advancements.—Whether a gift by a parent to a child is an advancement or an absolute gift held to depend on the intention of the parent.—McCabe v. Brosenne, Md., 69 Atl. Rep. 259.

51. **Discovery**—Physical Examination.—Defendant held to have no absolute right to demand physical examination of plaintiff; a motion therefor being allowed in the sound discretion of the trial court, which is reviewable on appeal.—Western Glass Mfg. Co. v. Schoeninger, Colo., 94 Pac. Rep. 342.

52. **Divorce**—Alimony.—The supreme court in the exercise of its appellate jurisdiction may hear a motion by a wife in an action for divorce for support and allowance for expenses in proceedings brought up on error.—Duxstad v. Duxstad, Wyo., 94 Pac. Rep. 463.

53. **Elections**—Registration Committee.—The failure to appoint registration committees on the 1st day of July, 1906, as expressly required by registration law (Laws 1905, p. 188, c. 100), does not, after the amendment of 1907, affect the validity of appointments of registration committees within the time prescribed by the Act 1907, p. 321, c. 147.—People v. Earl, Colo., 94 Pac. Rep. 294.

54. **Electricity**—Contributory Negligence.—

Where one heedlessly brings himself in contact with an electric wire and is injured, his contributory negligence will defeat recovery.—Haertel v. Pennsylvania Light & Power Co., Pa., 69 Atl. Rep. 282.

55. **Eminent Domain**—Compensation.—Where plaintiff owned two city blocks, comprising part of an addition to a city, which were fenced with two others, making a tract of about eight acres, the railroad company could not insist that the owner treat his entire holding as a farm to minimize his damages.—Missouri, K. & T. Ry. Co. v. Roe, Kan., 94 Pac. Rep. 259.

56.——Riparian Rights.—Legislation authorizing taking or damage of riparian rights held in contravention of Const. art. 1, sec. 16, prohibiting the taking of private property without compensation.—Kalama Electric Light & Power Co. v. Kalama Driving Co., Wash., 94 Pac. Rep. 469.

57. **Equity**—Enforcement of Trust.—Where a daughter delivers a deed to her father in trust under an oral contract, and the trust was not carried out, equity will enforce it, whether the constructive fraud was intentional or not.—Cardiff v. Marquis, N. D., 114 N. W. Rep. 1088.

58. **Estoppel**—Ratification of Acts of Others.—Deed made pending suit to cancel deed to grantor held valid and grantor's grantor estopped by ratification to assail the same.—Jennings v. Brown, Okl., 94 Pac. Rep. 557.

59. **Evidence**—Extrinsic Evidence.—In an action to recover money advanced on a contract of sale, extrinsic evidence as to intention of parties held admissible.—Prowers v. Nowles, Colo., 94 Pac. Rep. 347.

60.——Insanity.—Evidence of a non-expert is equally as competent as that of an expert on an issue of sanity.—Weber v. Della Mountain Min. Co., Idaho, 94 Pac. Rep. 441.

61.——Presumptions.—Where cohabitation is admitted to have been illicit in the beginning, it is presumed to have continued illicit until the contrary is shown.—Weidenhoft v. Primm, Wyo., 94 Pac. Rep. 453.

62.——Parol Evidence.—Where defendants in writing agreed to pay plaintiff a commission for selling their tangible properties, a contemporaneous oral agreement may be shown whereby they agreed to pay him the same commission for the sale of the capital stock of the company.—Wells v. Hocking Valley Coal Co., Iowa, 114 N. W. Rep. 1076.

63. **Execution**—Validity of Judgment.—Where the sheriff seeks, in replevin, to justify the seizure under an execution issued in another case, he must prove a valid judgment before he can attack a transfer of the property in fraud of creditors.—Cockell v. Schmitt, Okl., 94 Pac. Rep. 521.

64. **Extortion**—What Constitutes.—Under Pen. Code, sec. 519, to constitute extortion, held the injury threatened must be in itself unlawful, irrespective of the purpose with which the threat is made.—People v. Schmitz, Cal., 94 Pac. Rep. 407.

65. **Fire Insurance**—Action Against Agent.—In an action to recover damages for loss of property by fire, on the ground of failure of defendants, insurance agents, to carry out an oral contract to insure the same, evidence held insufficient for recovery.—Mooney v. Merriam, Kan., 94 Pac. Rep. 263.

66. **Fraud**—Evidence.—In an action to recover the value of cattle alleged to have been obtained by fraud, evidence examined and held to show that the cattle were obtained from plaintiff by defendant's fraudulent representations, upon which plaintiff relied.—Murray v. Davies, Kan., 94 Pac. Rep. 283.

67. **Garnishment**—Claims by Third Persons.—In garnishment in which a third person claimed the property in the hands of the garnishee, a judgment held merely to adjudge that the third person had no title to the property.—Toner v. Toner, Mich., 115 N. W. Rep. 712.

68. **Grand Jury**—Drawing Jurors.—Jury box held not prepared in accordance with Wilson's Rev. & Ann. St. 1903, c. 46, sec. 6 (section 3313), and a grand jury drawn from said box is illegal, and an indictment returned by such jury should be set aside.—McGinley v. Territory, Okl., 94 Pac. Rep. 525.

69. **Highways**—Drainage of Highways.—The highway authorities have a legal right in making highway improvements to make a ditch along the roadbed, and thereby render the highway less accessible to an abutting owner who cannot recover for the injuries sustained.—Dean v. Highway Commissioner for Tallmadge Tp., Mich., 115 N. W. Rep. 739.

70. **Homestead**—Enforcement of Right.—In a suit to quiet title, where plaintiff claimed title under a declaration of homestead by his grantor, evidence examined, and held sufficient to warrant the finding by the trial court that at the time the homestead was declared persons visited the house for the purpose of prostitution.—Harlan v. Schulze, Cal., 94 Pac. Rep. 379.

71.——Existence of Right.—When the homestead character has once attached, it may remain for the benefit of the sole surviving member of the family.—Weaver v. First Nat. Bank, Kan., 94 Pac. Rep. 273.

72.——Occupancy and Use.—In an action to quiet title, the evidence examined, and held insufficient to show that the property was used by plaintiff's grantor at the time of making her declaration of homestead primarily as a house for carrying on the business of prostitution, so as to prevent its being declared a homestead.—Harlan v. Schulze, Cal., 94 Pac. Rep. 379.

73. **Husband and Wife**—Ante-Nuptial Agreements.—The marriage of the parties to an ante-nuptial agreement is a mutual and adequate consideration for the promises therein contained.—Nesmith v. Platt, Iowa, 114 N. W. Rep. 1053.

74.——Community Property.—Where a divorce was granted without any disposition of the community property, the parties were thereafter tenants in common thereof.—Graves v. Graves, Wash., 94 Pac. Rep. 481.

75.——Separate Maintenance.—The district court has jurisdiction of a suit by a wife for separate maintenance independently of a divorce action or of a criminal proceeding for the husband's failure to provide reasonable support.—Austin v. Austin, Colo., 94 Pac. Rep. 309.

76. **Indians**—Status of Indian Nations.—Members of the Sisseton band of Sioux Indians allowed to take lands in severalty are wards of the government, which had the right to impose such terms as to the proceeds of the sale of such lands as it might deem proper.—Minder v. First Nat. Bank, S. D., 114 N. W. Rep. 1094.

77. **Indictment and Information**—Statutory

Offenses.—Where ownership is required to be alleged in an indictment, an allegation of possession is usually sufficient, and to allege that a train was on the track of a designated railway company is to charge possession in the railway company named.—State v. Leasman, Iowa, 114 N. W. Rep. 1032.

78. **Insane Persons**—Appointment of Guardian.—The heirs apparent of an alleged incompetent may appeal from an order of the county court dismissing their petition for such appointment, under Cobbey's Ann. St. 1903, sec. 5384; appeal being allowed in probate matters under section 4823.—Tierney v. Tierney, Neb., 115 N. W. Rep. 764.

79. **Interstate Commerce**—Exemption from Garnishment.—The fact that an indebtedness due to a non-resident railroad company arose out of the conducting of interstate commerce does not exempt it from garnishment under a foreign attachment.—Johnson v. Union Pac. R. Co., R. I., 69 Atl. Rep. 298.

80. **Intoxicating Liquors**—Mulct Tax.—Where a cold storage warehouse in a city was used by one through an agent for the storage of beer until sold and distributed to retailers in the city, the mulct tax must be assessed.—In re Des Moines Union Ry. Co., Iowa, 115 N. W. Rep. 740.

81.——Proceedings to Procure License.—Motion to dismiss appeal on ground that plaintiff, appellant, had by some act estopped or barred himself from prosecuting his appeal, can be taken advantage of only by plea in bar or in abatement, as the case may be.—Moon v. Hartsuck, Iowa, 114 N. W. Rep. 1043.

82. **Judgment**—Administrator's Settlement.—A finding that an administrator's final account was settled on a certain date does not preclude him from asserting, as an individual, error in a subsequent decree so affecting his relation to the estate.—In re Sullivan's Estate, Wash., 94 Pac. Rep. 483.

83.——Default.—Proceedings to set aside default decree held not defective.—San Diego Realty Co. v. McGinn, Cal., 94 Pac. Rep. 374.

84. **Justices of the Peace**—Jurisdiction.—Where neither of two notes exceed $100, and each stipulates to give a justice jurisdiction in an action on the note to an amount not exceeding $300, they cannot be united in one action in justice's court where the combined amount to be recovered exceeds $100.—Nauman v. Nauman, Iowa, 114 N. W. Rep. 1068.

85. **Life Insurance**—Beneficiaries.—Beneficiaries have no interest whatever in the sums paid as premiums by the insured to secure a benefit to those entitled to the proceeds of the policy upon maturity; all rights to such sums upon rescission of the contract by the parties being clearly vested in the insured.—Slosum v. Northwestern Nat. Life Ins. Co., Wis., 115 N. W. Rep. 796.

86. **Limitation of Actions**—Part Payment.—A debtor who conveyed land by absolute deed to his creditor as security, and thereafter conveyed his equity of redemption to a third person, held not entitled to require the creditor to apply in payment of the debt an amount claimed to be due on a prior transaction.—McCarron v. Wheeler, Mich., 114 N. W. Rep. 1028.

87. **Malicious Mischief**—Evidence.—Where an indictment for malicious injury to the property of another describes the property as that of a person named, it is sufficient to prove that the property was in the possession of such person, though he was not the owner.—State v. Leasman, Iowa, 114 N. W. Rep. 1032.

88. **Mandamus**—Counties.—The duty of the county commissioners to provide for the payment of all claims where the allowance is not absolutely void is a continuing duty, against which limitations is no defense.—State v. Farrington, Neb., 114 N. W. Rep. 1100.

89. **Master and Servant**—Assumed Risk.—Plaintiff's intestate held not to have assumed the risk of injury from an accident caused by another servant permitting water to come in contact with explosive material, since it was not an ordinary risk which the employees of other departments assumed.—Charron v. Union Carbide Co., Mich., 115 N. W. Rep. 718.

90.——Assumed Risk.—An employer held not liable for the death of an employee who was killed by clay rolling into the pit in which he was shoveling.—Ritzema v. Valley City Brick Co., Mich., 115 N. W. Rep. 705.

91.——Care Required.—Defendants were charged with a high degree of care commensurate with the intrinsically dangerous character of dynamite to guard against injuries to their employees.—Anderson v. Smith, Minn., 115 N. W. Rep. 743.

92.——Cause of Injury.—In an action for the death of a servant, the court should have directed a verdict for defendant; there being no evidence as to the cause of the accident.—Olmstead v. Hastings Shingle Mfg. Co., Wash., 94 Pac. Rep. 474.

93.——Defective Appliances.—An employer is not required to furnish absolutely safe appliances, but only with reasonably safe ones.—McDonald v. California Timber Co., Cal., 94 Pac. Rep. 376.

94.——Injury to Servant.—In an action by a station agent against a railroad company to recover for injuries received by snow and cinders thrown by a snow plow through the window of the station, evidence held sufficient to show negligence justifying recovery.—Atchison, T. & S. F. Ry. Co. v. White, Kan., 94 Pac. Rep. 265.

95.——Injury to Servant.—Evidence that defendant's foreman had ordered the removal of the boulder held admissible to show that the foreman had knowledge of the unsafe condition of a slope where plaintiff was working when injured.—Stratton Cripple Creek Mining & Development Co. v. Ellison, Colo., 94 Pac. Rep. 303.

96. **Mortgages**—Assignment of Debt.—The transferee of a negotiable promissory note, payment of which is secured by a deed of trust, held not an incumbrancer to whom power of sale is given within Civ. Code, sec. 858, and therefore such transferee, though the assignment of the note to him has not been recorded, may, upon the maker's default, demand a sale of the trust property to satisfy the indebtedness.—Stockwell v. Barnum, Cal., 94 Pac. Rep. 400.

97.——Deed Absolute.—Under Mills' Ann. Code, sec. 261, oral evidence held admissible to show that a deed absolute on its face constituted a mortgage.—Blackstock v. Robertson, Colo., 94 Pac. Rep. 336.

98.——Sale by Trustee.—After a sale under a trust deed by the attorney of the trustee corporation, a letter written to the purchaser by such attorney regarding a repurchase of the

property by the former owner held not binding on the trustee.—Stockwell v. Barnum, Cal., 94 Pac. Rep. 400.

99. **Municipal Corporations**—Change of Street Grade.—Where plaintiff presented a claim to the city for damages to his property by changing the grade of a street, and accepted a sum allowed therefor, the presumption is that such amount was in full compensation, and the burden is on him to prove that both parties intended it only as part payment.—City of Rawlins v. Jungquist, Wyo., 94 Pac. Rep. 464.

100.——Damages for Change in Street Grade.—In an action for damages to plaintiff's property by changing the grade of a street, where plaintiff had presented his claim to the city and a part of it was allowed and received by him, evidence examined, and held insufficient to sustain the finding of the trial court that the parties understood and intended the sum received by plaintiff to be only a part payment of his claim.—City of Rawlins v. Jungquist, Wyo., 94 Pac. Rep. 464.

101.——Obstructions in Street.—A municipal corporation must keep its streets free from obstructions, and a traveler may presume that it has done so, and that he can pass over them without danger.—Mickey v. City of Indianola, Iowa, 114 N. W. Rep. 1072.

102. **Negligence**—Contributory Negligence.—Though the negligence of the one injured may have been the primary cause of the injury, yet recovery may be had if the consequences thereof might have been avoided by reasonable care by the other party.—Pilmer v. Boise Traction Co., Idaho, 94 Pac. Rep. 432.

103.——Dangerous Premises.—It is negligence to maintain a guy wire from a telephone post to the ground some 25 feet therefrom and within the line of travel between a street and railroad station grounds without anything to attract attention of one approaching the station in the dark.—Grant v. Sunset Telephone & Telegraph Co., Ca'., 94 Pac. Rep. 368.

104. **New Trial**—Discretion of Trial Court.—The trial judge has discretionary power to grant an extension of time within which to file a motion for a new trial, and his refusal to do so will not be disturbed in the absence of abuse.—Nelson v. Carlson, Wash., 94 Pac. Rep. 477.

105.——Misconduct of Jury.—Consent of a party that the jury should retire and reconsider their verdict held not to prejudice his right to a new trial on the ground of the jury's misconduct.—Dralle v. Town of Reedsburg, Wis., 115 N. W. Rep. 819.

106. **Nuisance**—Injunction.—Where the continued operation of engines near plaintiff's property would further damage his house and furnishings and interfere with his enjoyment thereof, damages held not an adequate compensation, and plaintiff was entitled to an injunction.—Melvin v. E. B. & A. L. Stone Co., Cal., 94 Pac. Rep. 390.

107. **Partition**—Laches.—Where a decree of divorce made no disposition of the community property, an action by the wife for partition held not barred by laches, though not brought for about 13 years.—Graves v. Graves, Wash., 94 Pac. Rep. 481.

108.——Right to Partition.—The owners of some of the undivided interests held entitled to have their parts considered as one moiety, and to unite in an application for such partition.—Bowlsby v. Gregory, Iowa, 114 N. W. Rep. 1060.

109. **Payment**—By Check.—The giving of a bank check by a debtor is not, in the absence of agreement, payment, but the presumption is that it was accepted conditionally.—First Nat. Bank v. McConnell, Minn., 114 N. W. Rep. 1129.

110. **Pleading** — Alternative Pleading. — Where complaint alleges in the alternative two statements of fact, one of which constitutes a cause of action and the other not, they neutralize each other, and demurrer will lie.—Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co., Minn., 114 N. W. Rep. 1123.

111.——Clerical Errors.—In pleading, held that the date "1901" was properly treated as a clerical error for "1891."—State v. Quantic, Mont., 94 Pac. Rep. 491.

112.——General Demurrer.—Where a general demurrer is filed to a petition, if any paragraph states a cause of action, the demurrer should be overruled.—Cockrell v. Schmidt, Okl., 94 Pac. Rep. 521.

113.——Necessity.—While a new cause of action may not be alleged in a supplemental complaint different or additional relief, which is consistent with the original cause of action stated, may be asked for therein.—Melvin v. E. B. & A. L. Stone Co., Cal., 94 Pac. Rep. 389.

114. **Principal and Agent**—Authority of Agent.—An agent held to have no authority to borrow money for his principal.—Schramm v. Liebenberg, Colo., 94 Pac. Rep. 345.

115. **Prohibition**—Remedy by Appeal.—Prohibition does not lie to prevent the trial court from proceeding to try a case, though it erroneously refused a dismissal at plaintiff's instance; the remedy by appeal being adequate.—State v. Superior Court of King County, Wash., 94 Pac. Rep. 472.

116. **Public Lands**—Town Sites.—Where townsite commissioners, under Act Cong. March 1, 1901, c. 676, 31 Stat. 861, by a misconstruction of the law, schedule a lot to a party who was not entitled to the same, after title has passed to a private party, equity will inquire as to whether or not such title shall be held as trustee for the party really entitled to the same.—Leak v. Joslin, Okl., 94 Pac. Rep. 518.

117. **Quieting Title**—Ante-Nuptial Agreements.—A widow seeking relief against her executed and fully performed ante-nuptial agreement has the burden of proving defects in the agreement sufficient to defeat it.—Nesmith v. Platt, Iowa, 114 N. W. Rep. 1053.

118. **Railroads**—Injury to Traveler at Crossing.—In an action against a railroad company for injuries to a traveler at a crossing, evidence held sufficient to sustain a finding of defendant's negligence.—Denver & R. G. R. Co. v. Mitchell, Colo., 94 Pac. Rep. 289.

119. **Receivers**—Compensation.—A receiver of a bank held entitled to receive reasonable compensation only, to be fixed by the court and to be less than a certain amount.—Riordan v. Horton, Wyo., 94 Pac. Rep. 448.

120. **Sales**—Performance of Contract.—Failure of the seller of machinery to ship it at the time and in the manner required by the contract of sale held to release the buyer from his obligation to accept it.—Fountain City Drill Co. v. Lindquist, S. D., 114 N. W. Rep. 1098.

121. **States**—Claims Against.—Under Const. art. 4, sec. 18, and Act March 9, 1905 (Sess. Laws 1905, p. 366), the state board of examiners may disallow in whole or in part a claim of a state officer for clerk hire in his office.—Bragaw v. Gooding, Idaho, 94 Pac. Rep. 438.

122. **Statutes**—Registration Acts.—The registration acts (Laws 1905, p. 188, c. 100, as amended by Laws 1907, p. 321, c. 147) held not to control the opening or conducting of elections within Const. art. 5, sec. 25, subd. 15.—People v. Earl, Colo., 94 Pac. Rep. 294.

123. **Street Railroads**—Care Required Toward Trespassers.—A boy 14 years old, entering on a railroad right of way inclosed by fences, held a trespasser and required to keep a careful watch for approaching cars.—Wade v. Detroit, Y., A. A. & J. Ry. Co., Mich., 115 N. W. Rep. 713.

124.——Injury to Alighting Passenger.—In an action against a street railroad for injuries to a passenger while alighting, the questions whether she indicated her purpose to alight, whether reasonable time was given her so to do, or whether she waited until the car was starting and then stepped out, were properly left to the jury.—Farrell v. Citizens' Light & Ry. Co., Iowa, 114 N. W. Rep. 1063.

125.——Injury to Person on Track.—The right and duty of pedestrians and a street railway company at a street crossing are reciprocal.—Pilmer v. Boise Traction Co., Idaho, 94 Pac. Rep. 432.

126.——Who Are Passengers.—An employee of a street railroad company while riding on a car to his place of work is a passenger, if he so rides of his own volition, and pays his fare in coupons issued by the company as a part of his wages.—Hebert v. Portland R. Co., Me., 69 Atl. Rep. 266.

127. **Subrogation**—Right of Mortgagee.—Under Civ. Code, secs. 2969, 2970, a creditor who pays the mortgage on property which he wishes to attach cannot be subrogated to the right of the mortgagee, but must sell under execution in the original action.—Carstenbrook v. Wedderien, Cal., 94 Pac. Rep. 372.

128. **Taxation**—Board of Equalization.—The state board of equalization and assessment acts in a quasi judicial capacity, and its action is not subject to collateral attack, except for fraud, or for the exercise of powers not conferred upon it.—State v. State Board of Equalization and Assessment, Neb., 115 N. W. Rep. 789.

129.——Tax Sale.—A notice to eliminate the right of redemption in the owner of lands sold for taxes, held void, and the land owner had not lost his right to redeem.—Minnesota Debenture Co. v. Harrington, Minn., 115 N. W. Rep. 746.

130.——Tax Titles.—The constitutional provision providing that all grants, etc., shall be in the name of the people of the state and signed by the Governor, etc., does not apply to the statute empowering tax collectors to grant to purchasers at public auction land bought by the state at sales for delinquent taxes.—Phillips v. Cox, Cal., 94 Pac. Rep. 377.

131. **Tenancy in Common**—Care and Management of Property.—Tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property in the absence of special agreement or mutual understanding to that effect.—Wolfe v. Childs, Colo., 94 Pac. Rep. 292.

132. **Trial**—Action to Recover Money.—In an action to recover money which defendants conspired to induce plaintiff to pay, a letter written by one of defendants being admissible to explain his conduct, the other defendants should have requested that its consideration be limited to that purpose if he so desired.—Aughey v. Windrem, Iowa, 114 N. W. Rep. 1047.

133.——Reopening Case.—The application to reopen the case for further evidence after the amendment of the complaint to conform same to the proofs must show that defendant was misled or prevented from introducing evidence to rebut that on which the amendment was based, and that, if the case is reopened, he will be able to present testimony tending to rebut such evidence.—Hedstrom v. Union Trust Co., Ga., 60 S. E. Rep. 386.

134. **Vendor and Purchaser**—Bond for Deed to Convey.—A grantee in a bond for deed becomes, on his assignment of an interest in the bond to a third person, a trustee of such interest in favor of the third person, and on the conveyance of the legal title he holds the title for the benefit of the third person.—Wolfe v. Childs, Colo., 94 Pac. Rep. 292.

135. **Waters and Water Courses**—Appropriation.—A diversion of water not applied to some beneficial use does not constitute an appropriation.—Town of Sterling v. Pawnee Ditch Extension Co., Colo., 94 Pac. Rep. 339.

136.——Use for Irrigation.—In an action to enjoin diversion of water from a stream from which plaintiffs irrigate, a finding that plaintiffs' land had been irrigated from the stream for 25 years is immaterial, since plaintiffs are entitled to have it continue in its customary flow, subject to reasonable use by other riparian owners.—Huffner v. Sawday, Cal., 94 Pac. Rep. 424.

137. **Wills**—Undue Influence.—In a will contest, the burden of proving undue influence is on the party asserting it.—Snodgrass v. Smith, Colo., 94 Pac. Rep. 312.

138. **Witnesses**—Competency.—Under Pierce's Code, sec. 937 (Ballinger's Ann. Codes and St. sec. 5991), plaintiff in a suit to quiet title against defendant, claiming title to an undivided half as heir of his deceased mother, whom plaintiff married, held not competent to testify as to the marriage.—Nelson v. Carlson, Wash., 94 Pac. Rep. 477.

139.——Competency of Physician.—Under Mills' Ann. St., sec. 4824, a physician not authorized to practice under the laws of the state held not forbidden to testify concerning information acquired in attending a patient.—Colorado Springs & Interurban Ry. Co. v. Fogelsong, Colo., 94 Pac. Rep. 356.

140.——Impeachment.—Where a witness testifies that the reputation of another witness for truth and veracity in the neighborhood where he resides is bad, he may be asked if he would believe such witness under oath.—People v. Ryder, Mich., 114 N. W. Rep. 1021.

141. **Writ of Error**—Questions Reviewable.—It is not necessary to assign the overruling of a motion for a new trial as error, unless it is desired to have reviewed all matters embraced therein without further assignment.—Riordan v. Horton, Wyo., 94 Pac. Rep. 448.